

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Petition of Franklin W. Olin College of Engineering

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D.T.E. 01-95

**OPPOSITION OF FRANKLIN W. OLIN COLLEGE OF ENGINEERING
TO MOTION OF BOSTON EDISON COMPANY, d/b/a NSTAR ELECTRIC,
TO JOIN BABSON COLLEGE AS A PARTY IN THIS PROCEEDING**

Boston Edison Company, d/b/a NSTAR Electric (“Boston Edison”) has brought a motion seeking to join Babson College (“Babson”) as a party in this proceeding (the “Motion”). Boston Edison contends both that Babson is an indispensable party to this proceeding and that Babson is illegally providing distribution service to Franklin W. Olin College of Engineering (“Olin”). Motion, p. 1. Because both contentions are wrong, Olin hereby opposes the Motion.

I. BACKGROUND

Olin is a scholarship-based educational institution that began instructional operations in September 2001. Petition, ¶ 1. It currently is utilizing temporary facilities while its permanent facilities are being built on land that Olin purchased from Babson. Olin Responses to BE-1-4, BE-1-5, BE-1-14, BE-1-34. Babson, too, is an academic institution that owns land straddling the Wellesley-Needham border. Olin Response to BE-1-1, Attachments BE-1-1A, B, C. Babson’s electrical service historically has been provided by WMLP through facilities located in Wellesley, even though some of Babson’s property is located across the line in Needham. WMLP Response to BE-2-19, BE-2-32. In particular, the only electrical service ever provided

to the area of Olin's new campus (*i.e.*, a portion of Babson's property that Olin purchased) – security lighting – was provided by WMLP. Hannabury Affidavit, ¶ 2.¹ Indeed, a portion of a roadway on Olin's new campus with security lighting powered by WMLP had to be relocated to facilitate construction of Olin's new campus. Hannabury 2/20/02 Affidavit, ¶ 1. Boston Edison has never provided service to the property in question. Hannabury Affidavit, ¶ 2.² On November 9, 2001, Olin filed the instant Petition seeking an advisory ruling by the Department that Olin may receive electric service from the only utility that has ever served the property in question: Wellesley Municipal Light Plant (“WMLP”). Petition, ¶ 3.

Currently Olin is receiving electrical power from switch gear owned by Babson in Wellesley. Olin Response to BE-1-34. Power to a selector switch on Babson's property is supplied by WMLP. *Id.* The power runs a short distance – approximately 100 feet – from the selector switch to Babson switch gear through an underground line owned by Babson. Attachment BE-1-5A. The power then runs from the switch gear to Olin's temporary facilities through lines owned by Olin. Olin Response to BE-1-34. Save for the short run from the selector switch to the switch gear, at no point does Olin's temporary electrical power run through lines owned by Babson. Attachment BE-1-5A.

¹ Citations to “Hannabury Affidavit” are to the Affidavit of Stephen Hannabury dated November 8, 2001, filed together with Olin's Petition. Citations to “Hannabury 2/20/02 Affidavit” are to the Affidavit of Stephen Hannabury dated February 20, 2002 and annexed hereto as Attachment A.

² Boston Edison has historically provided electrical service to several former residences (on separate lots, see Attachment BE-1-1A) that Olin is currently using for administrative purposes. Petition, ¶ 4. Olin does not seek to switch this service from Boston Edison.

The Department is according expedited treatment to this proceeding due to Olin's need to know whether the property in question can continue to take its power from WMLP or instead will be required to take service from Boston Edison, so that Olin can make appropriate arrangement for the receipt of permanent service from one or the other of those utilities once the issues in this proceeding have been adjudicated. See Petition, ¶ 10.³

II. ARGUMENT

A. Babson is Not a Necessary Party

Boston Edison argues, first, that Babson is a “necessary party” to these proceedings. Motion, p. 2. As an initial matter, Boston Edison concedes, as it must, that the Department's regulations do not provide for the joinder of necessary parties. Motion, p. 2. Boston Edison nonetheless contends that the Department's regulations reference the Massachusetts Rules of Civil Procedure, which do provide for such joinder,⁴ as instructive with respect to various issues. In fact, however, the regulations to which Boston Edison cites deal with discovery rather than with issues such as joinder of parties. See Motion, p. 2, citing 220 C.M.R. 1.06(6)(c). Accordingly, there appears to be no authority for the Department to order joinder of a party such as Babson.

³ Boston Edison makes much of permanent underground facilities that Olin has installed. Olin will explain on the record how such facilities (i.e., Olin's own distribution system) would be the same whether permanent power supply comes from WMLP or Boston Edison. It is simply a matter of what point of the distribution system has the connection to the electric power supplier.

⁴ See Mass. R. Civ. P. 19(a).

Even assuming *arguendo* that such authority existed, however, Boston Edison has failed to show that Babson is a necessary party. Boston Edison argues that “it has become clear that Babson has information critical to the resolution of this matter, which has not been provided by Olin or WMLP (and/or may not be available to them).” Motion, p. 2. But under the Department’s regulations Boston Edison can obtain evidence from Babson even though Babson is not a party. See, e.g., 220 C.M.R. 1.10(9)(providing that parties may issue subpoenas to obtain documents and testimony of witnesses). Thus, even if Babson were in sole possession of information “critical” to the resolution of this proceeding, Boston Edison could obtain such information without making Babson a party.⁵ Significantly, while arguing by analogy to the Massachusetts Rules of Civil Procedure, Boston Edison has failed to cite a single case in which a court has ever ordered joinder of a party who merely had information regarding, rather than an interest in, the litigation.

Moreover, even if merely being in possession of information did render one an “indispensable party,” Boston Edison has not shown that the information it claims it needs is, in fact, “critical” to the resolution of this proceeding. The ultimate issue for the Department to determine is whether Olin may receive permanent service from WMLP, Petition, ¶ 3, or whether instead Boston Edison has the exclusive right to serve Olin’s new campus. The examples of information that Boston Edison claims to need from Babson are wholly irrelevant to this determination. Neither the extent to which

⁵ Boston Edison’s suggestion that it has not been able to obtain requested information from Olin is untrue. An objective reading of the discovery responses that Boston Edison references in this regard (Olin Responses to BE-1-14 and BE-1-32) reveals Olin’s answers to be fully responsive to the questions posed.

Babson's load may have increased due to Olin's temporary taking of power from WMLP at Babson's switch gear, nor details regarding Babson's campus, nor the extent of Olin's temporary electricity needs during the construction of its campus, see Motion pp. 2-3, has the slightest bearing on whether Olin has the right to take its permanent supply of electricity from WMLP.

Indeed, it is manifest that, contrary to Boston Edison's position,⁶ complete relief can readily be afforded to Boston Edison, Olin, and WMLP in this proceeding without making Babson a party. The issue is whether Olin can take power on a permanent basis from WMLP. Boston Edison has utterly failed to show that the resolution of that core issue depends in any way on the role that Babson's switch gear facility and 100 feet of line has played in the provision of temporary power to Olin.

Accordingly, Boston Edison's Motion seeking to join Babson as a "necessary party" should be denied.

B. Babson Is Neither Distributing Electricity Nor In Violation of the WMLP Tariff

Boston Edison also claims both that Babson is "distributing" electricity within the meaning of G.L. c. 164, § 1, and that it is reselling electricity and is therefore in violation of WMLP's tariff. Both claims are wrong.

⁶ Boston Edison also makes much of its allegations of violations of law resulting from the existing arrangement for temporary power. See Olin Response to BE-1-34. First, a determination of whether the technical violation alleged by Boston Edison is occurring at all depends on the resolution of the ultimate issue – whether the new campus area is subject to the Boston Edison monopoly. Boston Edison's misplaced presumptions as to that result are not controlling. Second, assuming *arguendo* that Boston Edison's view ultimately prevails, any violation will be abated because Olin has agreed to abide by any ruling by the Department that Boston Edison should serve the new campus. Therefore, it is wholly unnecessary for the Department to expend time and resources on the issue at this juncture. Finally, the existence of so-called "middlemen" is common throughout the Commonwealth in the form of hundreds,

First, Babson is not “distributing” electricity. As Boston Edison recognizes, “distribution” occurs only when, *inter alia*, there is a “delivery of electricity over lines” Motion, p. 4, quoting G.L. c. 164, § 1. WMLP is delivering electricity to the Babson selector switch over WMLP-owned lines. Attachment BE-1-5A. Olin is taking electricity from the Babson switch gear over Olin-owned lines. *Id.* The *de minimis* length of approximately 100 feet of line between the selector switch and the switch gear plainly is not what the Legislature had in mind when it defined “distribution,” particularly considering that the switch gear at the end of that short length of line serves Babson as well.

Nor is Babson “reselling” electricity in violation of the WMLP tariff.⁷ See Motion, p. 5. Boston Edison maintains that, simply because Babson is allowing Olin to make use of Babson’s switch gear facility as part of an overall accommodation between the two, there is “consideration” and therefore a “sale.” Motion, p. 5. Boston Edison has, not surprisingly, provided no authority beyond its own *ipse dixit* for the proposition that this arrangement constitutes a “sale” of electricity. Indeed, if one were to accept Boston Edison’s expansive readings of the terms “sale” and “distribution,” then every landlord and mall owner who leased premises with utilities included would be in violation of his respective utility’s tariff as a “reseller” and in violation of G.L. c. 164, § 1 as a “distributor.”

if not thousands, of landlords providing electricity to their tenants, and thus Babson’s small role in the provision of temporary power to Olin is cause neither for alarm nor for emergency treatment.

⁷ Even if Babson were reselling electricity, it is difficult to fathom how Boston Edison has standing to raise the issue. Moreover, the matter is not one with which the Department normally gets involved.

In sum, Boston Edison has failed to establish that Babson is either a “distributor” or a “reseller” of electricity.

CONCLUSION

For the foregoing reasons, Boston Edison’s Motion should be denied.

Respectfully submitted,

FRANKLIN W. OLIN
COLLEGE OF ENGINEERING

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